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Evaline Harmon and Conrad Harmon v. Otto Rasmussen et al : Brief of Plaintiffs-Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

EVALINE HARMON and
CONRAD HARMON,
Plaintiffs-Appellants,

vs.

OTTO RASMUSSEN, LeREE RASMUSSEN, his wife; LEONARD M. SPROUL, and AMERICAN FALLS CANAL SECURITIES COMPANY, a corporation,
Defendants-Respondents.

Case No. 9690

Brief of Plaintiffs-Appellants

Appealed from the District Court of Salt Lake County, Utah
Merrill C. Faux, Judge

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STATEMENT OF CASE

(a) In this case Plaintiffs-Appellants sought to recover a judgment against Defendants-Respondents establishing a right of way for an irrgation ditch across land owned by Defendants-Respondents, and for damages for destroying the same.

(b) The court below held that Plaintiffs-Appel-

lants had abandoned such a right of way, and entered judgment against Plaintiffs-Appellants. (R. 11-12).

(c) Plaintiffs-Appellants seek a reversal of the judgment and a direction to the court below to amend its Findings of Fact, Conclusions of Law, and enter a judgment in favor of Plaintiffs-Appellants and against Defendants-Respondents granting Plaintiffs-Appellants the right of way prayed for, together with the damage shown by the evidence, and the costs incurred in the court below, and on the appeal.

(d) The original Complaint in this action was brought by Delbert B. Harmon and Conrad Harmon against Otto Rasmussen. (R. 1-3). Thereafter and before trial Delbert B. Harmon died and his wife, Evaline Harmon, was, by leave of court, substituted as a plaintiff in lieu of her deceased husband, Delbert B. Harmon. LeRee Rasmussen, the wife of Otto Rasmussen, Leonard M. Sproul and American Falls Canal Securities Company, a corporation, were, by leave of court, added as additional defendants. (R. 4-6).

The case was tried on the issues raised by the Second Amended Complaint, and the Answer thereto. (R. 8-10). It was made to appear by the Deed, Exhibit 1-P, that Delbert B. Harmon and Conrad Harmon on the 5th day of July, 1958, conveyed by Warranty Deed the property to which plaintiffs-appellants claim as appurtenant an irrigation ditch across the land owned by defendants-respondents through which the land of

plaintiffs-appellants has been irrigated under claim of right for more than sixty years.

The reference to the pages where the evidence occurs are the pages in the Transcript as shown by the Court Reporter.

The evidence offered by plaintiffs-appellants and received by the Court at the trial is in substance as follows:

Mr. Irwin Fisher, a witness called by plaintiffs, testified that he has examined the site of the ditch here involved; that his business is that of excavating. (Tr. 5). That the cost of excavating the ditch would be thirty cents a running foot, or $10.00 an hour, plus travel time one way on the job. His testimony was not changed on cross-examination. (Tr. 6).

Exhibits 1 and 2, a Deed and an Abstract of the property, were received in evidence. Counsel for defendants admitted that the Harmons owned the property shown on the diagram. (Tr. 7). It was further admitted by the attorney for defendants that the property presently owned by plaintiffs was distributed to them and the property now owned by defendants was by the same Decree of Distribution distributed to the predecessors in interest of defendants. (Tr. 8).

Conrad Harmon, one of the plaintiffs, was called as a witness for plaintiff, and in substance testified as follows:

That he now does, and since he was eight years old has, resided on the Harmon property shown on the diagram. (Tr. 13). That the Harmon property is irrigated with water that comes from Mill Creek and reaches a point about the middle of the Freestone property where there is a gate. (Tr. 15). That the gate is to let the water flow north for a distance of about 150 feet where it turns west; that the witness is sixty years old, and that the ditch has been there as long as he can remember, and has been used to carry water to irrigate the Harmon property. (Tr. 16). That the ditch is on the Rasmussen's property, and flows north and then west. (Tr. 17). That the ditch extends north from the gate on the Freestone property and extends north and then west along the boundary of the Rasmussen property. (Tr. 18). That about 15 acres of the Harmon property is irrigated through that ditch, and has been so irrigated ever since the witness can remember. That he does and has claimed the right to use that ditch. (Tr. 19). That part of the ditch was filled in during 1960. That about the last of March, 1960, he had a conversation with Mr. Rasmussen in which he, Mr. Rasmussen, said that he owned the property and would do as he liked about it. (Tr. 20). That he would have the witness arrested if he cleaned out the ditch. That the ditch was used to irrigate the 15 acres of land until about '57 or '58, that he has not been able to use the ditch since it was filled in; that the times the ditch was used depended on the season. If it was a dry season, the ditch was used at least twice a year and probably

more. That the ditch was used every year before 1957 or 1958. (Tr. 21).

The water comes from Mill Creek. That witness knew the Government did not do any work in that immediate vicinity, and did not fill in the ditch; that the Government did some work on the west side of the Harmon property for which the Government paid eighty and witness paid twenty because the property was being flooded. (Tr. 22). That the property was flooded during high water in 1951 or 1952; that the Harmon property was irrigated after the Government did the levelling.

On cross-examination Mr. Harmon further testified:

That he used the water through the ditch across the Rasmussen property not only in dry years, but whenever he needed the water. (Tr. 23). That he guessed he did not use the ditch along in front of the Rasmussen property in 1959 because he did not need it then; that he irrigated the big part of the Harmon property in 1959. (Tr. 24). That the ditch that was used to irrigate the Harmon property in 1959 is four or five hundred feet south of the Rasmussen property, or about 300 feet south of the south boundary of the Rasmussen property. (Tr. 26). That there was no gate to prevent the water from flowing south, but there was a gate to prevent water from flowing north; that a dam was used to prevent the water from going south. (Tr. 28). That in 1958 he used the ditch going north. (Tr. 29). That

he did not use the ditch in front of the Rasmussen property after the City brought the city water along Eleventh West; that he did not know when the City brought the water along Eleventh West. (Tr. 30). That he irrigated the Harmon property after the city water was brought in, but not the land irrigated through the ditch that runs north; that he did not know that the City made big piles of dirt in the ditch that runs north. (Tr. 31). That there is dirt filled at the headgate. (Tr. 33). That he did not fill in all of the dirt shown by the picture, Exhibit 3-D. That he filled some dirt at the gate where the water is diverted to the north; that he filled in only a small part of that dirt. (Tr. 34). That he does not recall when he filled in the dirt, but it was not in 1951. It could have been in '57 or '58; that it was filled in after the culinary water was brought in. (Tr. 35). That he does not know who filled in the other dirt; that dirt was put in there before 1957 or 1958; that he has never put in a big bulk of dirt. (Tr. 36). That the rest of the dirt was filled in after 1960; that he did not see Mr. Rasmussen fill in the dirt. (Tr. 37). That it looked like the dirt had been filled in before Mr. Rasmussen was working there.

The picture marked D-3 was admitted in evidence over the objection of Counsel for plaintiffs. (Tr. 38).

On re-direct Mr. Harmon further testified:

That he could not irrigate all of the Harmon property from the ditch that runs southwesterly. (Tr. 39). That he could not irrigate the northern part of the

Harmon property through the ditch that runs southwesterly; that the kids would pull out the gate in the ditch that runs north, which gate stops the water from running north; that he put the dirt in front of that gate to prevent them from pulling out the gate and turn the water to the north. (Tr. 40). That the dirt put in front of that gate prevented the children from turning the water to the north. (Tr. 41). That there are 45 acres in the Harmon property (Tr. 42). That the river flooded the west side of the Harmon property. (Tr. 46).

Dean Harmon was called as a witness for plaintiffs, and in substance testified as follows:

That plaintiff, Conrad Harmon, is his uncle, being a brother of his father who died May 27, 1961. That he is familiar with the property involved in this controversy; that he lived on the Harmon property for about 25 years; that he is 36 years old. (Tr. 47). That he lived on the property from the time he was born up until 1950, and came back in 1953, and moved away from there in 1953, and has been familiar with the property off and on all the time; that he has assisted in irrigating the property most of his life whether or not he has lived there; that he has done most of the irrigating during the last ten years; that his uncle lived on the property but worked for Hercules Powder. (Tr. 48). That the water got to the Harmon property through the main ditch and a side ditch; that the ditch that goes through the Rasmussen property was used to

irrigate the Harmon property until 1958; that in 1958 trouble was had with one of the neighbors who protested digging out the dam and running the water to the north. (Tr. 49). That a dam at the headgate was put in to prevent the water from running north; that the kids and people would take out the gate; that a canvass dam was placed in the main ditch to divert the water to the north; that the water run to the north and then west to irrigate part of the Harmon property; that in the opinion of the witness the northern part of the Harmon property cannot be irrigated from the ditch than runs southwesterly, and never has been so irrigated; that the north part of the Harmon property is unlevel; that the Government leveled 17 acres on the south. (Tr. 51). That while he was on the Harmon property he knew of the practice of putting dirt in front of the gate in the ditch that carries water to the north because of children interferring with the water by turning it north; that when the water did not run north, it ran southwesterly.

On cross-examination Dean Harmon testified:

That water was run through the ditch running north in 1958, but not in '59, '61 or '62. (Tr. 52). That water was not run in the ditch going north after they had a fight on July 3, 1958; that the ditch going north was used at least twice a year prior to 1958; that he used the water himself in 1957 and 1958; that the water was used through the north ditch up to 1958; that culinary water was brought in back in about 1954. (Tr.

55). That the culinary water was brought in after the river flooded, which could have been in '55; that he heard his uncle say that the water was not turned into the ditch going north after the culinary water was brought in, but he used the water through the ditch running in front of the Rasmussen property up to 1958; that the work of leveling the Harmon land was on the south seventeen acres. (Tr. 54). That a fill was made along the west boundary of the lots facing the street. (Tr. 55). That the Harmon property is not substantially lower than Eleventh West; that the water runs slowly as it comes from Eleventh West to the Harmon property. (Tr. 57). That the Harmon property is higher on the south than on the north; that the Jordan River is on the west boundary of part of the Harmon property; that the Jordan River west of the Harmon property runs north and east. (Tr. 57). That the fight they had about turning the water to the north was had with Charles Simms; that the fight was had because they were attempting to remove the dirt at the head of the ditch going north as shown on Exhibit 3-D. (Tr. 59-60). That when Mr. Sims protested removing the dirt at the gate he said that if we opened up that ditch he would kill us; that was before Mr. Rasmussen moved there. (Tr. 60). That there is a dike something like five or six feet high between the Harmon property and the rear of the lots. (Tr. 61); that he helped his father before he died to do the watering of the Harmon property. (Tr. 63).

It is not true that the witness has not been on the

Harmon property for watering purposes for the last three or four years; that he was there for such purpose last year. (Tr. 63-64). There was a headgate in the ditch running southwesterly to divert the water into the north ditch; that gate existed until after the flood. (Tr. 63). That the gate was not removed, but rotted away; that after the gate rotted away a canvas portable dam was used to direct the water into the ditch running north. (Tr. 64). That the ditch in front of the Rasmussen property was filled in during April, 1960, but the witness does not know what did the filling; that it is not a fact that there were a number of piles of dirt in the ditch in front of the Rasmussen property prior to 1960. (Tr. 65). That the Rasmussen house was moved onto that property in about July, 1960. (Tr. 66). The threat that Mr. Simms would kill them caused them to fail to remove the dirt running north in front of the Rasmussen property. (Tr. 67). That the ditch in front of the Rasmussen property was used in 1957 and the fight took place in 1958. (Tr. 67).

Evaline Harmon, one of the plaintiffs, testified on her own behalf in substance as follows:

That she has resided on the property referred to as the Harmon property for forty-one years; that she is the widow of Delbert B. Harmon, who was one of the original plaintiffs in this action. (Tr. 68). She knew how the Harmon property was irrigated; that it was irrigated with water from Mill Creek; that the water comes down through the Church property to

Eleventh or Tenth West, they call it both; that the ditch divides, one branch goes north and then west to the Harmon property to irrigate the northern part thereof; that they have grown grain, alfalfa or potatoes, and sometimes corn, on that property. (Tr. 69). That the ditch going north and west has been used to carry water to the north part of the Harmon property ever since the witness has lived there; that she knew her husband claimed the right to use this property or this ditch. (Tr. 70).

Cross Examination. That the ditch going north was not used in 1959 or 1960; that her son had a fight in 1958, but they used the water in 1958; that she has seen water in the ditch in front of the Rasmussen property many times, but does not definitely recall seeing it there each of the years '56, '57, '58 and '59. (Tr. 71). That she does not recall the years she saw them irrigating, but she took them down to do the irrigating and has been up with them to get the water. (Tr. 73). That both ditches were used to irrigate the Harmon property; that she was not present when Con Harmon claims to have had a conversation with Mr. Rasmussen about opening up the ditch, but Con came home and told her about the conversation.

Re-direct Examination. That she had a conversation with Mr. Rasmussen about filling in the ditch in March, 1962; that Mr. Rasmussen came to her place, (Tr. 74), and said why didn't she consult him about it; that he said that the Government filled in some of the ditch and that he filled in some. (Tr. 75).

Thereupon plaintiffs rested and Counsel for defendants moved for judgment dismissing the Complaint as to damages and as to the right of plaintiffs to use the ditch in front of the Rasmussen property because the use of that ditch had been abandoned. The Court granted the Motion as to damages, but denied the Motion as to abandonment. (Trs. 75 to 78).

Defendant Otto Rasmussen was called as a witness and testified on his own behalf in substance as follows:

That he put up earnest money for the purchase of the property referred to as the Rasmussen property in May, and made the first payment in June, 1960; that the only work he did on the property before he moved in was to plant a few trees. (Tr. 79). That when he moved in the ditch in front of his house was filled in so that you couldn't have run water through it. In some places there were piles and in some places it was level; there was one pile 12 or 15 feet through and four feet high. (Tr. 80). That he has hauled in top soil, but none to fill in th ditch; that he level out the pile; that he has never talked to Mr. Con Harmon; that he did nothing with the property in April. (Tr. 81). That he don't want the Harmons to use the ditch; that he tried to get the Harmons to run the water some other way. (Tr. 82).

Cross Examination. That 139½ feet is leveled in front of his place; that he filled in maybe six feet from his south corner and leveled the rest of the way; that

the ditch running east and west is still open. (Tr. 84). That he has not thrown trash in the ditch running west, but trash blew in there before he moved on the property; that the dirt in the dich was not leveled off when he moved his house on the property. (Tr. 85). That the ditch is open from the gate in front of the Freestone except for about ten feet where they have thrown in old garbage and some fifty-gallon drums in front of the Freestone place. (Tr. 86). If Mrs. Harmon will culvert the ditch all the way, she may run the water that way. (Tr. 87).

Redirect Examination. There is a fall from the east side of his property to the east edge of the Harmon property of about 10 feet.

Re-cross Examination. That he would not put a culvert in front of his place. (Tr. 90). That if water is run in front of his place, the Harmons should pay for running it through a culvert; that he intends to fill in the ditch on the land he purchased where it goes west. (Tr. 91).

Further Re-direct Examination. That he would permit the Harmons to dig a ditch across his land if they dug the ditch and constructed a culvert. (Tr. 92).

Ruth Beynon was called as a witness by the defendants and in substance testified as follows:

That she resides at 3090 South Eleventh West Street, has resided there for 12 years. (Tr. 94). That the piles of dirt that were on the north end of the Ras-

mussen property were put there in March, 1960, by the workers for the Government in connection with clearing of Mill Creek and changing th course of the river. That the last time the Harmons used the ditch in front of the Rasmussen property was in 1951; that was the year before the flood; that the Harmons attempted to use that ditch in 1958 when they were prevented from using the same; that the ditch was not used from 1951 to 1958; that in her opinion the elevation of Eleventh West is five feet higher than the east edge of the Harmon property; that the north corner of the Harmon property is about the same as the south. (Tr. 96).

Cross Examination. That she has never taken a course in surveying and the only means she has of knowing the elevation of the property is her observation; that she observed that in 1951 the Harmons had a gate in the main ditch, (the ditch than runs southwest), and they used the water for seven days so she could not get the water. (Tr. 98). That after the flood the Harmons used a pump to irrigate the land that the Government had leveled; that there was a wooden dam in the ditch that runs southwest; that she had never seen the Harmons use a canvas dam in that ditch. (Tr. 99). That in March, 1960, I told Con Harmon that the ditch had been filled in, but did not have a conversation about Rasmussen filling in the ditch. (Tr. 100). That she has tried to have the ditch changed across her land, but has given up such attempt. (Tr. 101).

Nick Coons was called as a witness by the defendants, and in substance testified as follows:

That he lives on the next lot south of the Beynon property; that he has lived there six years last February. That he has seen the Harmons irrigate their land, but has not seen them use the side ditch, (the ditch that runs north in front of the Rasmussen property.) (Tr. 103).

Cross Examination. That he has been over and talked to the Harmons and talked to the man that died while he was irrigating; that he did not see Harmon water through the ditch that runs north. (Tr. 103). That he has never seen the son of the Harmon who died irrigating. There was a ditch running north. (Tr. 105). That there was a ditch in front of the Rasmussen property which turned west to the Harmon property. (Tr. 105).

Further Re-direct Examination. That the Government placed some dirt in the ditch in front of the Rasmussen property in March, but he does not recall the year; that it was before Rasmussen moved onto the property; that he has an idea that Eleventh West is five, six or maybe ten feet in places higher than the east side of the Harmon property. (Tr. 106).

Mrs. Beynon was recalled and testified that she has never seen Dean Harmon watering any part of the Harmon property, (Tr. 107), and that the city water was brought along Eleventh West in the fall of 1955.

Plaintiffs-Appellants rely upon the following Points for the reversal of the judgment appealed from, and for an order of this Court directing the trial court to make Findings of Fact, Conclusions of Law and Judgment in favor of Plaintiffs-Appellants as prayed for in their Second Amended Complaint, and for their costs expended in the trial court and in this court.

POINT ONE

THE TRIAL COURT ERRED IN FAILING TO DECIDE ALL OF THE MATERIAL ALLEGATIONS RAISED BY THE PLEADINGS.

It is the repeated holding of this Court that it is the function and duty of the trial court to make findings on all of the material issues raised by the pleadings. Among the numerous cases so holding are: *Holm v. Holm,* 44 Utah 242, 139 Pac. 937; *Evans v. Shand,* 74 Utah 451, 457, 280 Pac. 239; *Thomas v. Farrell,* 82 Utah 535, 26 Pac. (2d) 328. That is the provision of *Rule 52 of the Utah Rules of Civil Procedure.*

In the Second Amended Complaint plaintiffs alleged and defendants in their Answer denied that plaintiffs were the owners of the land described in paragraph 2 thereof, and that defendants were the owners of the property described in paragraph 3. (R. 4). Defendants denied that allegation. (R. 8).

The trial court made no finding on that issue. In paragraphs 4, 7, 8, 9 and 10 of the plaintiffs' Second

Amended Complaint it is alleged that for more than 60 years plaintiffs and their predecessors in interest have openly, notoriously, adversely, continuously under claim of right used an irrigation ditch across defendant's land. (R. 10). Defendants deny such allegations. (R. 9). Apparently, however, by its finding No. 2 the Court assumed that plaintiffs had an easement across defendants' land as otherwise plaintiffs could not by "certain overt actions and failure of use abandon any and all rights of said side ditch." (R. 11-12). That is to say, one cannot well be said to have abandoned a right that he never had.

POINT TWO

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE A PURPORTED PHOTOGRAPH EXHIBIT D-3 OF THE POINT OF THE DITCH WHERE PLAINTIFFS CLAIM TO HAVE DIVERTED THE WATER TO THE NORTH TO IRRIGATE ABOUT 15 ACRES OF THEIR LAND.

At the time Exhibit D-3 was offered in evidence Counsel for plaintiffs objected to its admission "on the ground that it doesn't appear when this picture was taken, nor this was a condition at the time this matter complained of was found by Mr. Rasmussen." (Tr. 38). As will be seen from the summary of the evidence heretofore made in this Brief, the evidence at the time of the admission of the photograph showed that the

Harmons placed some dirt in front of the gate to prevent children and others from diverting the water through the north ditch when the Harmons did not want it through that ditch; that most of the dirt shown in the photograph was placed there by some one other than the Harmons, (Tr. 36, 37), and defendants offered evidence to the same effect. (Tr. 95).

Were it not because of the fact that the trial judge seemed to have bottomed his conclusion that the Harmons had abandoned their easement for an irrigation ditch across defendants' land solely because of the dirt in the ditch in front of the Rasmussen property, it might be said that the admission of the photograph was not prejudicial. Neither the fact that the Harmons placed dirt in front of the gate at the head of the ditch running north, nor the fact that some one else placed dirt in the ditch leading north tend to show that the Harmons had abandoned their right to course water in that ditch. So also, the authorities as we shall presently point out are all to the effect that the mere fact that the owner of an easemen fails to use the same for a short period of time will not support a finding of abandonment.

POINT THREE

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THAT THE EVIDENCE DOES NOT SUPPORT THE FINDING THAT

OTTO RASMUSSEN DID NOT FILL IN AT LEAST PART OF THE DITCH IN FRONT OF THE PROPERTY WHICH HE AGREED TO PURCHASE, AND ALL OF THE EVIDENCE, INCLUDING THAT OF SAID DEFENDANT, SHOWS THAT HE RATIFIED THE FILLING IN OF SAID DITCH.

As we have heretofore pointed out, the trial court at the conclusion of plaintiffs' evidence granted a Motion made on behalf of the defendants that plaintiffs were not entitled to any damage against the defendant Rasmussen on account of the alleged filling in of the ditch in front of the property that he agreed to purchase. At the time the Motion was made there was before the court this testimony:

Irwin Fisher testified as to the cost of reconstructing the ditch in front of the Rasmussen property. (Tr. 6).

Defendant Conrad Harmon testified that he had a conversation with Mr. Rasmussen in March after he found the ditch was filled in; that he asked Rasmussen if he was going to clean out the ditch; that Rasmussen said he owned the property, that he didn't have to clean out the ditch; that he could do as he liked about it; that if Mr. Harmon cleaned it out he would have him arrested. (Tr. 21, 22).

Plaintiff Evaline Harmon testified that she had a talk with Mr. Rasmussen about two or three weeks

before the trial, and that he said he had filled in some of the ditch since he moved there. (Tr. 75).

Later when Mr. Rasmussen testified on his own behalf he stated he filled in about five feet of the ditch and leveled off the dirt that was in the ditch. (Tr. 83). That he would not consent to the reconstruction of the ditch unless a culvert was constructed in the same. (Tr. 91).

In *Black's Law Dictionary, Third Ed., page* 1496, ratification is defined thus: In a broad sense, the confirmation of a previous act done either by the party himself or by another. Numerous cases are there cited where the courts have passed on the question of ratification. To the same effect see 75 *C.J.S., page* 608, and cases cited in footnotes.

In *Vol. I of Words and Phrases, Permanent Edition, pages* 191 *to* 195, together with cumulative Annual Pocket parts for use during 1962-1963, there is an annotation of numerous cases including the case of *Jones v. Mutual Creamery Company,* 81 Utah 223, 17 Pac. (2d) 249, 259, 85 A.L.R. 908, discussing the matter of ratification.

In the Utah case this Court held that under the facts there shown there was not a ratification. However, the Court recognized the law to be that there may be a ratification of a tort as well as of a contract.

In this case Rasmussen approved and finished the filling in of the ditch and denied plaintiffs the right to reconstruct the same. (Tr. 82-86).

POINT FOUR

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW, IN THAT, THE EVIDENCE SHOWS THAT THE PLAINTIFFS DID NOT INTEND TO ABANDON THE USE OF THE DITCH EXTENDING ACROSS THE LAND WHICH DEFENDANT OTTO RASMUSSEN HAS AGREED TO PURCHASE, ON THE CONTRARY THE EVIDENCE IS NOT SUFFICIENT TO SUSTAIN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

While the trial court made no direct Finding on the issue of whether or not plaintiffs ever had an easement for an irrigation ditch across the land which Rasmussen agreed to purchase, it is obvious that the court must have believed that plaintiffs had such an easement because they could not have abandoned such a right unless they at some time had such a right. Moreover the evidence is all to the effect that plaintiffs had an easement for an irrigation ditch as alleged in the Second Amended Complaint. See testimony of Conrad Harmon, (Tr. 16), and that of Evaline Harmon. (Tr. 70). There is no evidence to the contrary. In this state one who uses an irrigation ditch adversely under a claim of right for a period of twenty years acquires a prescriptive right to use such. *Zollinger v. Frank,* 175 Pac. (2d) 714, 110 Utah 514; *Tripp v. Bagley, et al.,* 276 Pac. 912, 74 Utah 57.

The law is well settled that to constitute an abandonment of property or other right it must be made to appear that the owner of such property or right intended to divest himself of all right, title or interest in the property or right, and such intention must be made evident by some external act by which that intention is carried into effect. 1 *Am. Jur., 2nd Ed., Secs.* 15 *to* 17, *uages* 15 *to* 18; *Third Edition of Tiffany on Real Property, Sec.* 825, *page* 384; 1 *C.J.S., Sec.* 1, *page* 4. Numerous state and federal cases are cited in footnotes in support of the texts. Reference to a few of the numerous cases cited in footnotes to the text will show that judicial authority is in harmony with said texts.

The authorities are uniform in holding that a high degree of proof is necessary to establish an abandonment. Thus, in the case of *Adams v. Hodgkins,* 109 Me. 361, 84 Atl. 530, it is said that evidence necessary to establish an abandonment must be clear and unequivocal of acts that are decisive and conclusive. In the case of *Sullivan Const. Co. v. Twin Falls Amusement Co.,* 258 Pac. 529, 530, 44 Ida. 520, it is said that:

> "It is elementary that an abandonment of any right is dependent upon an intention to abandon and must be evidenced by a clear unequivocal and decisive act of the party."

Other cases of similar import are collected in *Note* 36, *Sec* .825, *page* 386, *3rd Ed. of Tiffany on Real Property*, and in the text and cases cited in footnotes in 1 *C.J.S.* 9, and in 1 *Am. Jur., 2nd Ed.,* in text and footnotes Sec. 36, page 29.

The adjudicated cases are all agreed that the mere non-use of a right, unless continued for a long period of time, is not sufficient to support a finding of an abandonment. Some of the cases hold that mere non-use no matter how long cotninued will not support a finding of abandonment, especially when an easement is based upon a grant. ***Richardson v. Tumbridge,*** 111 Con. 90, 149 A. 241, 61 N.D. 359, 237 N.W. 835.

In the case of ***Groshean, et al., v. Dellmont Realty Co.,*** 12 Pac. (2d) 273, 92 Mont. 229, it is held that the non-users of an easement for less than the time required to establish an easement will not support a judgment of an abandonment. That is likewise the holding in ***Piper v. Vorhees,*** 130 Me. 305, 155 A. 566, and in ***Fruit Growers Ditch & Reservoir Company, et al., v. James W. Donald,*** 41 Pac. (2d) 518, 96 Col. 264.

The authorities generally teach that positive evidence is entitled to greater weight than is negative evidence. 20 ***Am. Jur., Sec.*** 1186 ***and*** 1187, ***pages*** 1037-1039. On page 1039 of 20 Am. Jur., it is said:

> "When, however, a credible witness with apparently adequate opportunity for observation testified to an occurrence the mere testimony of other witnesses that they were not cognizant of the occurrence where the opportunities of the latter for observation was not such or their attention was so engrossed that they probably would not have observed the event if it had occurred, or where their opportunities were not co-extensive with those of the witness who testified positively to the occurrence is entitled to no weight

and is not sufficient to create a conflict in the testimony."

Numerous cases are cited in footnote 4 which in effect support the test. The foregoing quotation from Am. Jur. is cited with approval in the case of *Graham v.* Leek, 144 Pac. (2d) 475, 482.

In this case Conrad Harmon, Dean Harmon and Evaline Harmon each testified that prior to 1958 water was diverted through the ditch (running north and west across the property purchased by defendant, Otto Rasmussen) was used to irrigate the north part of the Harmon property. (See Tr. 2, 4 and 6).

Ruth Beynon, a witness called by defendants, testified that for 12 years she has resided at 3090 South Eleventh West Street, and that the last time the Harmons used the ditch in front of the Rasmussen property was in 1951, the year before the Harmon proprety was flooded; that she had never seen the Harmons use a canvass dam. (Tr. 96). There is nothing in the evidence tending to show that she had any occasion to observe when the Harmons used the ditch across the Rasmussen property.

Nick Coons testified that he for six years has lived on the lot next to that of Mrs. Beynon, and that he has not seen the Harmons use the ditch across the Rasmussen property. (Tr. 103).

Under the law announced in the cases above cited the testimony offered by defendants does not reach the point where there is a conflict with the direct, positive

evidence of plaintiffs. If we are wrong in making the foregoing statement it obviously may not be said that the evidence offered by defendants is such as to establish an intention of the Harmons to abandon their easement for an irrigation ditch across the Rasmussen property by clear, unequivocal and decisive evidence.

Nor may it be said that there is evidence of any external act of the plaintiffs sufficient to show that plaintiffs intended to abandon their easement over the Rasmussen property. We have heretofore directed the attention of the Court to the law that mere non-use of an easement for less than 20 years is not sufficient to support a finding that the same has been abandoned. The longest period that there is any evidence of a failure to use the ditch across the Rasmussen property comes from Mrs. Beynon. She testified that the last year the ditch was used across the Rasmussen property was in 1951, the year before the flood from the Jordan River. If she is to be believed there would probably be no occasion to irrigate that part of the Harmon property while it was covered by the flood. She does not advise us of how long the flood existed. It is made evident that the former owner of the Rasmussen property was resisting the use of the ditch across the land which Rasmussen has agreed to purchase, and that when in 1958 the Harmons attempted to use that ditch a Mr. Simms threatened to kill them if they removed the dirt at the gate through which water is diverted across the Rasmussen property.

This action was commenced in 1960. It is apparent

that the Harmons did not intend to abandon their right to use the ditch involvesd in this litigation in 1958 when they attempted to use the same, but refrained from doing so because of the threats made against them.

Apparently the trial court took the view that there was so much dirt at the gate through which water is diverted across the Rasmussen property as shown by the photograph D-3 that the Harmons must have intended to abandon their easement across the Rasmussen property. The evidence shows without conflict that some dirt was placed at said gate to prevent children and others from diverting the water across the Rasmussen property when it was not wanted through that ditch. That only a part of th dirt shown by the picture was placed there by the Harmons, and there is no evidence as to when or by whom the excess dirt was placed at that gate. (Tr. 40 and 49).

While there are cases holding that where the owner of an easement constructs or consents to the construction of a permanent improvement which prevents the continued use of an easement, he may be said to have abandoned his right to the use of an easement, we have not found a case or other authority which holds or tends to support a judgment where the trier of the facts has been sustained in rendering a judgment based upon the belief that more dirt has been placed in a ditch, by someone, than is necessary to prevent children or others from diverting water through a ditch at a time when water was not desired through such ditch.

POINT FIVE

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF DEFENDANT OTTO RASMUSSEN, AND ITS FAILURE TO RENDER A JUDGMENT IN FAVOR OF PLAINTIFFS AS PRAYED FOR IN THEIR SECOND AMENDED COMPLAINT.

In support of this point we adopt what is said under Point Four. In addition to what is there said we direct the attention of the Court to the fact that the reason which requires a very high degree of evidence to establish an abandonment of property or other rights is because people who own valuable rights are generally reluctant to part with the same. In this arid region the right and means of using water to irrigate lands is often as valuable and at time much more valuable than the land itself. To conclude that the Harmons intended to give up the right to use the ditch through which fifteen acres of their land had been irrigated for as long as they could remember would be to attribute to them a condition of mind rarely, if ever, possessed by normal people. It would in effect attribute to them the intention to destroy much, if not all, of the value of fifteen acres of their land. It is submitted that the evidence in this case falls far short of sustaining any such conclusion.

WHEREFORE, plaintiffs pray that this Court reverse the Judgment appealed from, and direct the court below to enter judgment in favor of the plaintiffs-

appellants as prayed for in their Second Amended Complaint.

Respectfully submitted,

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